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CHAPTER I

THE CHARTER AND ITS HISTORY

In 1215 Magna Carta was a failure. It was intended as a peace and it provoked war. It pretended to state customary law and it promoted disagreement and contention. It was legally valid for no more than three months, and even within that period its terms were never properly executed. Yet it was revived in the re-issues of 1216, 1217 and 1225. The last version became law, to be confirmed and interpreted in Parliament and enforced in the courts of law. Three of its chapters still stand on the English Statute Book.[1] These embody, with some slight and occasional amendments, four of the original provisions of 1215.[2] No other English legal enactment has enjoyed such long life. Some of these measures survived because they seemed to have a specific value. Until 1970, for example, the prohibition of fish-weirs in cap. 23 still sought to preserve navigation on the Thames and other rivers.[3] Some survived because they were harmless confirmations of rights and privileges conveyed by other instruments. Hence the Charter still declares that the English

[1] Caps. 1, 9, 29. The savings clause of cap. 37 also remains. Since the first edition of this book of 1965, when nine chapters survived, cap. 14 was repealed by the Criminal Law Act 1967 c.58, and caps. 8, 15, 16, 23 and 30 by the Statute Law (Repeals Act) 1969 c.52, which came into effect 1 January 1970. The residual chapters of the Charter of the Forest were repealed in 1971. In both cases repeal originated in the proposals of the Law Commission established in 1965. See Pallister (1971), pp. 98–101. For the survival of parliamentary interpretations of cap. 29 of the Charter of 1225 see Pallister (1971), pp. 100–1.

[2] The relation of the chapters is as follows:

1225	1215
cap. 1 (amended)	cap. 1
cap. 9 (amended)	cap. 13
cap. 29 (amended)	caps. 39, 40

[3] 1225, cap. 23; 1215, cap. 33.

church shall be free[4] and still confirms, but does not define, the privileges of the city of London and other towns and boroughs.[5] But the other surviving clause states deeper principles and less restricted privileges. At the other extreme from the fish-weirs of cap. 23 there stands cap. 29, which lays down that no free man is to be imprisoned, dispossessed, outlawed, exiled or damaged without lawful judgement of his peers or by the law of the land.[6] Cap. 29 owes its continued existence to the *pietas* of legislators and lawyers, for it is not now essential or often even relevant to the liberty of the individual. But this *pietas* is in turn a product of the long struggles in which men appealed to this principle against authority. Individual freedom can be justified by many methods. There is no logical reason for including Magna Carta among them. That something survives from 1215 is a reflexion of the continuous development of English law and administration. Magna Carta has been preserved not as a museum piece, but as part of the common law of England, to be defended, maintained or repealed as the needs and functions of the law required. That so much of what survives is now concerned with individual liberty is a reflexion of the quality of the original act of 1215. It was adaptable. This was its greatest and most important characteristic.

Lawyers have been responsible for much of this survival and for the residual veneration of the Charter. Led by Sir Edward Coke they re-instated it as a document of political importance in the seventeenth century. Since then they have produced the two great commentaries, Blackstone's of 1759 and McKechnie's of 1905. The memorial at Runnymede is the work of the American Bar Association and lawyers on both sides of the Atlantic are largely responsible for the annual gatherings of the Magna Carta Society. But the legal profession has not been wholly at one in this. One of the

[4] 1225 and 1215, cap. 1. [5] 1225, cap. 9; 1215, cap. 13. [6] 1215, cap. 39.

most vigorous criticisms of the Charter's claim to any kind of permanent legal stature was the work of a lawyer, Edward Jenks.[7] Moreover, it is now possible and indeed justifiable for a lawyer to compose a general survey of the freedom of the individual in England with little reference to Magna Carta.[8] Lawyers have not always acted with a single-minded concern for preservation. In 1895 Maitland wrote that 'this document becomes and rightly becomes a sacred text, the nearest approach to an irrepealable "fundamental statute" that England has ever had'.[9] Yet since the Statute Law Revision Act of 1863 Parliament, under the direction of its legal members, had repealed clause after clause of Magna Carta along with other outdated sections of the legal code. This ambivalence was not new in the nineteenth century. In his *Second Institute* Coke did well to select cap. 29 as worthy of especial praise. 'As the gold-finer', he wrote, 'will not out of the dust, threds or shreds of gold, let passe the least crum, in respect of the excellency of the metall: so ought not the learned reader to let passe any syllable of this Law, in respect of the excellency of the matter.'[10] No one reading the *Second Institute* would guess that common lawyers since the fourteenth century had spent a great deal of time and thought on evading the payment of feudal incidents, which Magna Carta regulated and confirmed, by inventing and developing the use and other legal devices.[11] The lawyers of the fourteenth century were not the first to evade or adjust the Charter's terms. In the generation after 1215, lawyers and administrators failed to apply the strictures of cap. 24[12] against the use of the writ *praecipe* to the rapidly proliferating writs of entry which, like

[7] Jenks (1904), 260–73.
[8] Harry Street, *Freedom, the Individual and the Law* (Penguin Books, 1963), p. 271.
[9] Pollock & Maitland (1898), I, 173. (Where full details are not given in the footnote, these will be found in the References.)
[10] *Second Institute* (1662 ed.), p. 57.
[11] Plucknett (1948), pp. 544–55. See also Sanders (1956), pp. 105–7.
[12] 1215, cap. 34.

the *praecipe*, had the effect of evading the jurisdiction of private courts.[13] Bracton himself glossed the provision on amercement by peers in cap. 14 in a manner which was almost certainly the exact opposite of what the king's opponents intended in 1215.[14]

Coke and his colleagues did not fight for the whole Charter, but for their own selection from it, and for their own interpretation of that selection. To Coke 'the Charter was for the most part declaratory of the principal grounds of the fundamental laws of England, and for the residue it is additional to supply some defects of the Common Law'. Its provisions had been 'confirmed by the wise providence of so many acts of Parliament',[15] and it embodied fundamental incontrovertible law, which itself went back beyond the Charter to the days before the Norman Conquest. He made the double assumption that a grant of feudal privileges which was more than four hundred years old was relevant to his own society, and that this grant of privileges was not an *ad hoc* statement but a declaration of existing law which was already ancient in 1225 and 1215.[16] In pursuit of this assumption he over-rode even the best authority. 'In the reign of Henry II', he wrote, 'the king exacted an uncertain relief, for so Glanvill saith who wrote in this time. . .and therefore how necessary it was that the ancient relief should be restored is evident.'[17] Coke accepted the Charter against the foremost legal authority of the twelfth century. For him, Magna Carta, not Glanvill, was the better evidence of ancient law.

Coke was seeking the continuous thread in English law. He was concerned with precedent, with principles and judicial decisions which in his view indissolubly linked his world with the past. The modern historian seeks the opposite. For Coke, Magna Carta was an affirmation of fundamental law and the liberty of the subject. For the

[13] See below, pp. 325–6.
[14] 1215, cap. 21 (see below, p. 334).
[15] *Second Institute*, 'Proeme'.
[16] Pocock (1957), pp. 45–7.
[17] *Second Institute*, p. 7.

modern historian it is a statement of liberties rather than an assertion of liberty; a privilege which was devised mainly in the interests of the aristocracy, and which was applicable at its widest to the 'free man'—to a class which formed a small proportion of the population of thirteenth-century England. Before all else the historian seeks the precise contemporary meaning of the Charter, its intent, its vocabulary, its effects. All else is a distortion, an imposition on its 'real' content of anachronistic and perhaps politically motivated misinterpretations. This is not entirely the work of the twentieth century. In the seventeenth century Robert Brady had already asserted against the school of Coke that

> the far greatest part of Magna Carta, concerned Tenents in military Service only, and the Liberties, which our Ancient Historians tell were so mightily contended for, if seriously considered, were mainly the Liberties of Holy Church, by which, in most things, she pretended to be free from Subjection to a Temporal Prince; and the relaxation of the original rigor upon which Knights, or Military Fees were first given by the Lords, and accepted by the Tenents.[18]

Brady fully appreciated the double distortion for which modern historians have held Coke responsible. He wrote,

> Sir Edward Coke doth not care to hear of the Feudal Law as it was in use at this time, and hath a fine fetch to play off the Great Charter and interpret it by his Modern-Law, that was not then known or heard of, and it hath been and ever was, an Art of some men to interpret and confound New Laws by Old Practise and Usage; and Old Laws by late Usage and Modern Practice; when perhaps if they would endeavour to find out the History of those Laws, the Grounds and Reasons upon which they were made, there would be found no congruity between them.[19]

Much of this criticism of Coke is clearly valid. He treated law, as Brady put it, as though it 'had grown up with the Trees, Herbs and Grass'.[20] Yet it is not quite so secure as either Brady or the modern critics would suggest. It assumes that the exact contemporary sense of Magna Carta can be

[18] *Introduction to the Old English History* (London, 1684), p. 76, quoted Pocock (1957), p. 207.
[19] Quoted by Butterfield (1946), p. 76.
[20] *Ibid.* p. 76 n.

established as a canon whereby Coke and all other 'false' interpreters can be judged. But to seek this is to pursue a will-o'-the-wisp. The essays which commemorated the seven hundredth anniversary of Magna Carta included two by eminent scholars which expressed a notable difference of opinion on the meaning and intent of cap. 39 of the Charter of 1215[21] – the very clause on which Coke concentrated his interpretative talents. Vinogradoff and Powicke represent but two of the many modern interpretations of this clause.[22] Hence to argue that Coke distorted or falsified the 'meaning' of Magna Carta is to convey a false impression. Many of its provisions had no precise meaning. It was not an exact statement of law, either of Coke's law or of what the modern expert knows of thirteenth-century law, but a political document produced in a crisis. It was a product of intermittent negotiations which lasted for at least six months. It was the culmination of hard bargaining and skilful manœuvring. Perhaps it registered too the weariness of the negotiators in the face of the intractable character of the king, the intransigence of some of his opponents and the hard facts of English administration.

There are several important implications in this. First, there is little point in discussing the detailed wording and legal connotation of the Charter without examining the political circumstances which produced it. Far too little recognition has been given, for example, to the fact that the famous words of cap. 39 were derived in 1215, not from the barons but from the king and behind him from Pope Innocent III. In its final form it excluded arbitrary extra-legal action, but it also confirmed rather than weakened the traditional rights of the Crown within the law.[23] Secondly, there is often no hope of establishing a precise contemporary

[21] P. Vinogradoff (1917), *M.C.C.E.* pp. 78–95; Powicke (1917), *M.C.C.E.* pp. 96–121.
[22] For another variant see Ullmann (1961), pp. 164 ff. (on this, see below, p. 328, n. 154) and for further discussion of cap. 39, below, pp. 327–31.
[23] See below, pp. 329–30.

meaning of particular phrases or clauses. To attempt to do so is in itself to distort. When cap. 16 of the 1215 Charter laid down that no one was to be compelled to do greater service for his fee or free tenement than he ought, clearly the whole content of the clause was concentrated on that single indefinable 'ought'. Here the Crown could impose one interpretation, the barons yet another. Such vagueness affected a great deal of the Charter's purpose. It affected the application of cap. 48 concerning local and forest administration where local juries were required to define 'evil' customs,[24] and it affected all those clauses dealing with the restoration of rights where 'unjust' disseisins or fines had also to be defined.[25] The Charter failed to produce a lasting peace in 1215 just because this looseness of phrasing hid a real and irreconcilable difference of interpretation. Not all its vagueness was of this deliberate kind. Sometimes, as when it conveyed privileges to 'free men', it simply gave allusive recognition to the facts of English society in the thirteenth century.[26] Sometimes it was vague because of the perplexed reaction of men who were trying to grapple with a complex administrative system which was still very much the private perquisite of the king. Hence, for example, the provision that amercements should be proportionate to the nature of the offence and that barons should be amerced by their peers.[27] Who was to establish the exact proportion and who were the barons' peers? The meaning of the Charter leads not so much to precise definitions as to a contemporary range of opinion derived either from a conflict of interpretations or from general imprecision and vagueness of usage. This weakens the case against Coke. If contemporaries themselves were not always agreed then he cannot be written off quite so easily as a 'distorter'. It is a matter not of

[24] Caps. 52, 53, 55, 56, 57, 59.
[25] See below, pp. 340–2.
[26] See below, pp. 291–5.
[27] 1225, cap. 14; 1215, caps. 20, 21, 22.

distortion or falsification, but of whether he is to be included or not within the admissible range of opinion.

It is unfortunate that recent criticism has presented the 'common-law interpretation of history', which Coke represented, as the 'predecessor and to a large extent the parent of the more famous Whig interpretation'.[28] The ideas of Coke and his fellows later provided material for the Whig interpretation of history. But Coke was neither a Whig nor a Whig historian. Butterfield wrote,

> We must not forget what is the Whig interpretation of history *par excellence*—the interpretation of the constitutional conflict of the seventeenth century itself. And in this connexion we must note that the older writers [e.g. Coke] confront us with an inversion of the particular structure which we to-day would perhaps expect that interpretation to have. They do not give us an organization of English history for the purpose of expounding the growth of freedom, the evolution of the constitution, the widening of those rights of Englishmen that grow from precedent to precedent. At least if they do this, it is only one aspect of their work. Their history is based on the assumption that English liberty existed from the earliest times.[29]

The contrast between Coke and the Whigs could be carried much further, for Coke did not and could not partake of the powerful element of natural law in the Whig interpretation which underpinned their emphasis on individual liberty. Natural law, an essential component of the Whig interpretation, was, as we shall see, lethal to the survival in England of the common-law attitudes typified by Coke. Moreover, Coke and the Whigs differed in their methods. The essence of Whig history was to read the present back into the past and to interpret the past in the light of selected themes: the growth of liberty, the development of Parliament and, within Parliament, of the House of Commons, the growth of 'nationhood', and so on. The Whigs turned to history not

[28] Pocock (1957), p. 46. Compare Hill (1962), pp. 87–8.
[29] Butterfield (1944), pp. 69–70. Butterfield nevertheless continued to apply the term Whig to Coke, *ibid.* pp. 71, 72.

to justify the present; Locke's *Second Treatise* did that for them; but to explain how the present had evolved. Coke's object was quite different. He was not primarily concerned with writing history or interpreting the past. His aim was to call in the past in order to support his arguments about the present. Any judgement he made about medieval society was entirely subsidiary to this. Thus he was on the same track as the later Whig historians but was moving in the opposite direction. There was some occasional confusion since Coke had to assume that the past was like the present. He, like the Whigs, was therefore a disciple of historical continuity. But for him this was derived from the continuous unchanging element of fundamental law. For the Whig historians it was to be found in the progress of English society towards that of their own day. The object of Coke's antiquarianism was permanent, that of the Whigs was evolutionary. Coke was far closer to Bracton and Fortescue than he was to Locke, Macaulay or even Blackstone. He was less the first Whig than the last great medieval commentator on the common law of England. The antiquarianism of the late sixteenth and seventeenth centuries was no new phenomenon. It was the culmination of the medieval search and love for precedent.

The 'myth' of Magna Carta, that interpretation of it which gives it qualities which the men of 1215 did not intend, was part of the document's potential. Some of these myths were late creations, some arose within a generation of 1215. The decisive period in these developments was not Coke's day, but the fourteenth century, when many of the features of Coke's interpretation of the Charter were embodied in parliamentary statute.[30] In the fourteenth as in the seventeenth century the crucial clause was cap. 29.[31]

[30] For what follows and on the whole problem of the history of Magna Carta from the fourteenth century to the time of Coke, see Faith Thompson (1948).
[31] 1215, cap. 39.

Between 1331 and 1368, in six acts, Parliament passed statutory interpretations of this clause which went far beyond any of the detailed intention and sense of the original Charter. First, it interpreted the phrase 'lawful judgement of peers' to include trial by peers and therefore trial by jury, a process which existed only in embryo in 1215.[32] Secondly, the 'law of the land' was defined in terms of yet another potent and durable phrase—'due process of law', which meant procedure by original writ or by an indicting jury. It was construed to exclude procedure before the Council or by special commissions and to limit intrusions into the sphere of action of the common-law courts; it was even applied against trial for trespass in the Exchequer.[33] Thirdly, the words 'no free man' were so altered that the Charter's formal terms became socially inclusive. In the earlier statutes of Edward III of 1331 and 1352 they became simply 'no man',[34] but in 1354 in the statute which refers for the first time to 'due process of law', 'no free man' became 'no man of whatever estate or condition he may be'.[35]

Parliament pressed these new definitions against developing chancery and conciliar jurisdictions. The reassertion of the law of the land in the form of due process was accompanied by the establishment of processes associated with the trial of peers by peers in Parliament. Despite the long interval, the six acts of Edward III's reign were as essential to the lawyers of the seventeenth century as Magna Carta itself. They were adduced in evidence by defending counsel in the Five Knights' Case. Referring to the last of them, 42 Edward III, cap. 3, Selden said that 'the statute is not to be taken to be an explanation of that of Magna

[32] Trial by jury was imposed from above, not sought from below, in the later thirteenth and fourteenth centuries (see Plucknett (1948), pp. 114–25).

[33] Thompson (1948), p. 89.

[34] 5 Edward III, cap. 9; 25 Edward III, cap. 4 (*Statutes of the Realm*, I, 267, 321); Thompson (1948), pp. 90, 92.

[35] 28 Edward III, cap. 3 (*Statutes of the Realm*, I, 345); Thompson (1948), p. 92.

Charta, but the very words of the statute of Magna Charta'.[36] They appeared along with the Charter in the debate leading to the Petition of Right. Sir Benjamin Rudyerd declared,

> I shall be very glad to see that old, decrepit Law Magna Charta which hath been kept so long, and lien bed-rid, as it were, I shall be glad to see it walk abroad again with new vigour and lustre, attended and followed with the other six statutes; questionless it will be a great heartening to all the people.[37]

In 1641 the act which abolished the Star Chamber and other prerogative courts quoted from the Six Statutes along with cap. 29.[38] Coke and his disciples were following a well-worn track.

The developments between the fourteenth and the seventeenth centuries are not yet fully understood. The view that men lost interest in Magna Carta in the later middle ages and under the Tudors depends heavily on the evidence of parliamentary confirmations. As is well known, these show a sharp decline in the fifteenth century.[39] But this is an unreliable guide to the Charter's continuing importance. For example, in the preliminaries to the Heresy Act of 1534 the Commons expressed concern over the extension of ecclesiastical jurisdiction and the use of the *ex officio* oath. They relied on cap. 29 of Magna Carta, which the clerk transcribed in full in English; even more significantly, among seven statutes which they adduced in support, they included four of the Six Statutes of Edward III, some in summary, some with sections or fragments given *verbatim*. In 1534, therefore, as in 1629, precedents were searched and the linkages properly understood. The whole memorandum is

[36] Thompson (1948), p. 332. [37] *Ibid.* p. 86. [38] *Ibid.* p. 370.

[39] The practice of counting confirmations originated with Coke, who noted 32 in all (*Second Institute*, proeme). Bémont counted 15 under Edward III, 8 under Richard II, 6 under Henry IV, and one only under Henry V (1892, pp. xlix–l). Faith Thompson totalled 37 conciliar or parliamentary confirmations between 1327 and 1422 of which only 8 belong to the fifteenth century (1948, p. 10 n.).

headed *Magna Carta cap. xxix*.[40] Now the Heresy Act in its final form says nothing of this and gives no hint that Magna Carta had stalked through its origination.[41] The statute evidence, in short, is misleading. There are other indications that Magna Carta was alive and well. Readings at the Inns of Court of 1450 to 1550 reveal considerable interest in cap. 11, dealing with the location of the common pleas, and in due-process interpretations of cap. 29. It is significant that these were turned against non-common law jurisdictions of various kinds.[42] That, too, foreshadowed the seventeenth century.

The seventeenth-century interpretation which Coke typified produced some additions to the fourteenth-century glosses, but they were in the main minor extensions to, or clarifications of, an already widely extended range of interpretation. First, Coke openly asserted, what the Six Statutes had implied, that cap. 29 applied to villeins.[43] Secondly, he expanded the word 'liberties' so that it became tantamount to individual liberty. One of his purposes here was to attack Stuart grants of monopoly, not only those where the recipients enjoyed some process of restraint against infringers, which evaded due process, but against monopolies as such. 'Generally', he wrote, 'all monopolies are against this great Charter, because they are against the liberty and freedome of the Subject, and against the Law of the land.'[44] Thirdly, in the debate on the Petition of Right, lawyers

[40] *The Complete Works of St. Thomas More*, x, ed. John Guy, Ralph Keen, Clarence H. Miller and Ruth McGugan (New Haven, 1987), pp. lxii–lxvi. The document in question is P.R.O., SP 1/82. Magna Carta cap. 29 and the associated statutes are at fos. 57bv–58. All are in English. The translation of cap. 29 (*ibid.* p. lxiv, n. 5) is not drawn from Rastell's *Great Abridgement* of 1527, for which see Thompson (1948), p. 150.

[41] *Statutes of the Realm*, III, 454–5.

[42] *Spelman's Reports*, ed. J. H. Baker (Selden Society, XCIII, XCIV, 1976–7), II, 57–9, 71–2. For another law reading of cap. 29 see G. O. Sayles, 'A Fifteenth-Century Law Reading in English', *Law Quarterly Review*, XCVI (1980), 569–80.

[43] 'This extends to villains, saving against their Lord, for they are free against all men saving against their Lord' (*Second Institute*, p. 45). This formulation was ultimately derived from Bracton.

[44] *Ibid.* p. 47. On this see Thompson (1948), pp. 302–4, and D. O. Wagner, 'Coke and the Rise of Economic Liberalism', *Economic History Review*, VI (1935), 30–44.

argued that Magna Carta established grounds for the writ of Habeas Corpus although this did in fact originate as an administrative order issued by the king's courts.[45] The Petition of Right itself put the final touch to these developments. From the insistence of 1215 that some kind of lawful judgement should precede execution to the principle of 'no arrest without cause shown' of 1628 appears a big jump. The Petition of Right was not so much this as the last of a series of short strides.

Similar developments occurred in the history of other chapters. Over the years cap. 30[46] suffered an even more violent change of character. Initially it was mainly aimed against restrictions on the movement of alien merchants. It was regarded with some ambivalence since it could be used to protect the interests of foreign merchants against the native trader. It was therefore potentially inconsistent with cap. 9 which confirmed the privileges of London and other towns. Hence one of the most striking early appeals to it came from the representatives of the Italian company of the Bardi in 1320 who claimed exemption from the wool staple on the grounds 'that it is contained in Magna Carta that all merchants may come into the realm, stay therein and return thence safely and securely with their goods upon paying the due and accustomed customs'.[47] But within a few years from this the clause was extended to cover denizens as well as aliens. An act of 1328 temporarily abolished the wool staple 'so that all merchants strangers and privy, may go and come with their merchandises into England, after the tenor of the Great Charter'.[48] This act, and others subsequent which likewise extended the sense of the clause, arose from the quarrels between alien and native merchants and the

[45] Thompson (1948), p. 325. The Petition of Right itself did not take this line, but nevertheless associated arrest without cause shown and *habeas corpus* in the same clause. For the history of Habeas Corpus see Edward Jenks, 'The story of Habeas Corpus', *Law Quarterly Review*, XVIII (1902), 64–77, and Holdsworth, *History of English Law*, IX, 104–25.

[46] 1215, cap. 41.

[47] Thompson (1948), p. 111.

[48] 2 Edward III, cap. 9 (*Statutes of the Realm*, I, 259); Thompson (1948), p. 112.

arguments engendered by government policy towards the wool staple. They were not intended to provide general protection against prerogative taxation of trade. Nevertheless, they could be exploited in this way. Cap. 30 became the first chapter of Magna Carta to figure as a precedent in the contentions of the seventeenth century, first in Bate's case of 1608 and then in the debates on the Crown's new impositions on trade in the Parliament of 1610. Here, as in the later debates on cap. 29, William Hakewill relied on the fourteenth-century interpretations of this clause.[49] Twenty years or so later Coke simply treated the decision against Bate as illegal. 'A decision was given in the Exchequer', he wrote, 'for an imposition set upon currants, but the common opinion was, that the judgement was against law, and divers express acts of Parliament; and so by that which hath been said it doth manifestly appear'.[50] Moreover he applied this chapter, like cap. 29, against monopolies: 'All monopolies concerning trade and traffique are against the liberty and freedome declared and granted by this great Charter, and against divers other Acts of Parliament, which are good commentaries upon this Chapter.'[51] Much rich juice was ultimately squeezed from the unripened fruit of 1215.

This extension of the range of interpretation followed two main lines. First the Charter was used as a yardstick of legality against which new measures could be assessed, and accepted or rejected. Secondly, the sense of the Charter was repeatedly re-interpreted to ensure that it conformed to new social and political conditions. Both lines derived from the assumption that the Charter was fundamental law. This was not a fiction of the seventeenth century or even of the fourteenth. It was implicit in the original purpose of the Charter, for such a grant of liberties in perpetuity could not be made effective except by treating it as fundamental law. The drafters of the Charter did not themselves envisage this

[49] Thompson (1948), pp. 249–55. [50] *Second Institute*, p. 63. [51] *Ibid.*

continuous process of re-interpretation. There is no evidence at all that their remedies were broadly conceived because they saw the need to cater for future generations. Nevertheless they insisted that their demands should be met in as permanent a form as was possible. Furthermore, they exploited the weaknesses of Henry III to ensure that the Charter was confirmed in perpetuity by the first of John's successors. Thereby they made the first English statute.[52]

The first official interpretation of the Charter came in 1234 when king and magnates elucidated the intentions of cap. 35 concerning sheriff's tourns and the sessions of the courts of hundred and wapentake.[53] It was first expanded to cover major extensions of royal policy which had circumvented its original provisions, in the Confirmation of the Charters of 1297. This and the Petition of Right were in the same line of descent. They were both intended as glosses on a sacred legal text. Over four centuries there were gradual shifts in emphasis. In 1441 Chief Baron Frey made a famous statement of the relationship between the king and law. 'The law', he asserted, 'is the highest inheritance that the king has, for by the law he himself and all his subjects are ruled. And if the law were not, there would be no king and no inheritance.'[54] This derived from the traditional distinction between kingship and tyranny, which assumed that king and law ruled together. It was rather different from Coke's bald assertion that Magna Carta was 'such a fellow that he will have no sovereign', and different again from his argument 'that the common law hath so admeasured the prerogatives of the king, that they should not take away nor prejudice the inheritance of any; and the best inheritance that the subject

[52] Holt (1972); Holt (1985), pp. 18–19. For further discussion of grants *in perpetuum* see below, pp. 518–22.
[53] Powicke (1947). 1. 147–8 (see below, pp. 394–6).
[54] S. B. Chrimes, *English Constitutional Ideas in the Fifteenth Century* (Cambridge, 1936), p. 74; T. F. T. Plucknett, 'The Lancastrian Constitution', *Tudor Studies*, ed. R. W. Seton Watson (London, 1924), pp. 164 ff.

hath is the Law of the Realm'.[55] This was a development of the old principle of Bracton's *Addicio* that the king was beneath the law. Ultimately it helped to bring a king to the axe, but it would require extraordinary hindsight to discover that consequence in Coke.

The legal antiquarianism of Coke and his fellows marked the final fruition of medieval concepts of law and medieval forms of political argument. By the end of the seventeenth century Brady and others had attacked its historical inaccuracies and were breaking through to the realities of medieval law and administration which lay behind the assumptions of Coke and his fellows.[56] Historical criticism of this kind, however, was only one and that a minor reason for the sudden disappearance of the ancient fundamental law which Coke had expounded. Much more important was the spread of concepts of natural law and natural rights. Hobbes and Locke were the real enemies of legal precedent, for once positive law was based on natural law and that on natural right and reason, the need for precedent vanished. Hence there was no room for ancient law in the monolithic structure of the *Leviathan* or in the *Second Treatise of Civil Government*. Coke and his work were outmoded, irrelevant, and of antiquarian rather than political interest, a mere aberration which Hobbes dismissed in a few brief sections of the *Leviathan*.[57]

However, the advent of natural law marked not the end but yet another stage in the history of Magna Carta. Henceforth in England it became the political property of the radicals. Hitherto the Charter had been closely tied to the common law and the common-law courts. As a result of repeated parliamentary confirmations it had also been linked to the survival and expansion of the powers of Parliament. Now radical thinkers turned it against both. For them the

[55] *Second Institute*, p. 63.
[56] Pocock (1957), pp. 182 ff.; D. C. Douglas, *English Scholars* (London, 1951), pp. 119–38.
[57] Hobbes did discuss the Charter in the *Behemoth* (see Pocock, 1957, pp. 166–9).

liberties conveyed in the Charter were the birthright of free-born Englishmen, to be asserted against a parliament which could be just as arbitrary as the king had been, and against a system of common law which enabled the legal profession to batten on the litigating public and to join hands with parliaments in imposing an intolerable tyranny on the land. The real successors of Coke were not the Whigs, but the Levellers in the seventeenth century,[58] John Wilkes in the eighteenth century, and their successors among the Radicals of the early nineteenth century. It was only with the spread of Utilitarianism that the Charter finally came to the end of its long and varied political career in England.[59]

It also survived in America. There too the fight was not in defence of law and Parliament against the king, but for the rights of the colonists against both king and Parliament. Both for the radicals in England and for the Americans the chief value of the Charter lay in the fact that it was a concession, which had been granted or confirmed in the past; it was, as it had always been, a fault in the armour of authority. And just as the Charter was claimed by the English Radicals as a natural birthright, so in America some of its principles came to be established as individual rights enforceable against authority in all its forms, whether legislative, executive or judicial, whether represented by Crown, governor or council, or later by state and federal government. This embodied two streams of thought. On the one hand it was drawn from English law which came to be embodied in the legal structure of the early colonies.[60] Cap. 1 of the Massachusetts Body of Liberties of 1641, for example, did not quote, but

[58] Some of the Levellers, however, rejected the Charter in favour of natural law (see Hill, 1962, pp. 75–82). But they were not consistent. Overton, who described the Charter as 'but a beggarly thing', also went to Newgate prison clasping Coke's *Second Institute* to his bosom (Haller, *Tracts on Liberty*, III, 385–7). I owe this reference to the kindness of Anne Pallister.
[59] For the history of the Charter since the seventeenth century see Pallister (1971) and R. J. Smith, *England's Gothic Bequest* (Cambridge, 1987).
[60] H. D. Hazeltine, 'The Influence of Magna Carta on American Constitutional Development', *M.C.C.E.* pp. 184–97.

seems to have been based on cap. 29 of the Charter.[61] On the other hand it incorporated natural law. In England the two had been inimical. In America they worked hand in hand. Hence the Virginia Bill of Rights of 1776 called on Locke to assert in cap. 1 that 'all men are by nature equally free and independent, and have certain inherent rights ... namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety', and on Magna Carta in cap. 8 to lay down that no man was to be deprived of his liberty, 'except by the law of the land or the judgement of his peers'. Indeed the due process of law of cap. 29 came to be embodied in the Bill of Rights of state after state and was carried on from the eighteenth to the twentieth century. It was no longer so much a law as a statement of political principle. The Charter only survived alongside natural law by being raised to the same universal terms. Cap. 29 had become a convenient formulation of a natural right. This was as far removed from Coke's thoughts as Coke had been from the Great Charter itself.[62]

The history of Magna Carta is the history not only of a document but also of an argument. The history of the document is a history of repeated re-interpretation. But the history of the argument is a history of a continuous element of political thinking. In this light there is no inherent reason why an assertion of law originally conceived in aristocratic interests should not be applied on a wider scale. If we can seek truth in Aristotle, we can seek it also in Magna Carta. The class and political interests involved in each stage of the Charter's history are one aspect of it; the principles it asserted, implied or assumed are another. Approached as

[61] *Ibid.* p. 193; W. Macdonald, *Select Charters illustrative of American History 1606–1775*, pp. 73–4.

[62] A. E. Dick Howard, *The Road from Runnymede, Magna Carta and Constitutionalism in America* (Charlottesville, 1968); Philip B. Kurland,'Magna Carta and Constitutionalism in the United States: "The Noble Lie"', in Thorne, Dunham, Kurland and Jennings (1965), pp. 48–74.

political theory it sought to establish the rights of subjects against authority and maintained the principle that authority was subject to law. If the matter is left in broad terms of sovereign authority on the one hand and the subject's rights on the other, this was the legal issue at stake in the fight against John, against Charles I and in the resistance of the American colonists to George III.

The principles of the argument were not the only common element. One of the issues which led to the War of Independence was the Crown's refusal to abandon in America those prerogatives which had already been destroyed in England. Among the issues between Charles I and his subjects were the Crown's powers of arrest and imprisonment, its exploitation of feudal revenues and feudal incidents which the Stuarts had revived, its antiquarian search into prerogative forms of taxation and its revival of the forest law. Charles himself was conscious enough of the link with the past. His answer to the Petition of Right was that he would agree to confirm the Charter but 'would not have his prerogative straitened by any new explanation of Magna Carta'.[63] To confirm Magna Carta was a traditional palliative of medieval kings. Charles was later to call on the Charter as an argument for retaining episcopacy.[64] Indeed it was he, not his opponents, who claimed to stand for the ancient Constitution.

The history of the documents themselves carried problems from one period to another. The debate was sometimes confused by the difficulties of the text. In the thirteenth century men still appealed to the 1215 Charter even though it was no longer valid in law.[65] Within two generations of

[63] Butterfield (1944), p. 68.

[64] 'As a King at his coronation, he hath not only taken a solemn oath to maintain this order, but His Majesty and his predecessors in their confirmation of the Great Charter, have inseparably woven the right of the Church into the liberty of the subjects.' Gardiner, *Constitutional Documents*, p. 328. Charles's appeal to the coronation oath also had many medieval precedents.

[65] See below, pp. 397–400.

Runnymede the chroniclers of St Albans confused the texts of 1215 and 1225 in complete uncertainty as to what was valid and what was not.[66] In the seventeenth century Coke never used the Charter of 1215. His commentary, like most of the early seventeenth-century debates, was based on the re-issue of 1225. He only seems to have known of the 1215 Charter from the chronicle of Matthew Paris.[67] Others printed the St Albans version with little or no attempt to collate it with the authentic texts, and it was not until Blackstone's Commentary of 1759 that the two versions of 1215 and 1225, and the confused nature of the St Albans text, were properly and finally distinguished.[68]

But if textual confusion facilitated 'distortion' it was not itself the cause of it. 'Distortion' indeed was inherent in the Charter itself and in the whole debate. When Coke asserted that the Charter simply re-established ancient rates of relief, he not only misled his public; he was himself misled by the Charter. Just as Coke used Magna Carta as a defence of 'ancient liberties' against the Stuarts, so the barons of the Charter called on the Laws of Edward the Confessor and Henry I to maintain what they alleged was ancient custom against the government of King John. They distorted just as much as, if not more than, Coke.[69] Indeed, in the decade or so before the final crisis of 1215, the Laws of Edward and Henry were suitably doctored in order to strengthen the case against kings who acted unjustly and without the due forms of consent.[70] Hence it is quite invalid to treat Magna Carta as a kind of datum from which all subsequent departure was unjustified. Magna Carta was simply a stage in an argu-

[66] Holt (1964), 67–88.

[67] *Second Institute*, 'Proeme'. Coke here reveals no knowledge of the two originals of 1215 which came into the hands of Sir Robert Cotton, 1629–31. Nor did he try to collate the authentic text on which he commented in the *Second Institute* with the St Albans version which embodied both the 1215 and 1225 texts.

[68] See Butterfield (1944), pp. 25–30.

[69] See below, pp. 300–2.

[70] See below, pp. 93–5.

ment and bore all the characteristic features of the argument – the erection of interests into law, the selection and interpretation of convenient precedent, the readiness to assert agreed custom where none existed. It was not only law: it was also propaganda. Hence to accuse Coke or anyone else of 'distortion' is scarcely illuminating, for to distort a distortion is little more than venial. To describe him as a Whig is scarcely justified unless the same label is to be applied to Magna Carta itself, for both equally 'distorted' the past in the interests of the present. Indeed to do that would be to admit Coke's case. It would be tantamount to accepting that the facts themselves are 'Whig'.

The problem posed by the history of the Charter is not why and how it came to be 'distorted', but why it rather than any other document came to play the rôle it did. Initially it was called great not because of the greatness of its quality, not because, as Coke put it, it was *magnum in parvo*,[71] but because of its large size and to distinguish it from the companion Charter of the Forest.[72] Immediate contemporaries made no great claim for it. Yet it was a royal grant which survived as a basis for liberties rather than any claim which might have been based, for example, on the reign of Stephen, and it was this particular royal grant which survived rather than the earlier Charter of Liberties of Henry I.[73] Moreover, it not only survived but it became a sacred text, glossed, interpreted and extended, but in medieval times rarely questioned. The explanation of this is to be found not only in the years which followed 1215, but in the political crisis which produced the Charter and in the years before, during which the demands it expressed were slowly taking shape. The subsequent history of the Charter derived from the Charter itself. It re-

[71] *Second Institute*, 'Proeme'.

[72] White (1915), 472–5; (1917), 554–5.

[73] See below, pp. 36–8; 475–6.

flected in its quality the character of the men who achieved it and the nature of the society in which it came about. It is to these themes that the remainder of this work is devoted.

CHAPTER 2

GOVERNMENT AND SOCIETY IN THE TWELFTH CENTURY

Twelfth-century England had no constitution. There was no general system of government in which powers were balanced, functions allotted and defined, rights protected, and principles stated or acknowledged. Instead there were the materials from which a constitution of some kind might ultimately and indirectly be compounded. Government was evolving routine procedures, methods which it found convenient to use in most, but not necessarily all, circumstances. It operated in a society in which privilege seemed to be part of the natural order of things: privilege attached to this or that particular status, or privilege which individuals held as a result of royal favour, or privilege which great corporate institutions held as necessary conditions of their function. From these primitive elements to a settled constitution was a long, tortuous and often bloody journey in which the grant of charters of liberties was but one, and that an early, step. It was nevertheless a hazardous step, one which required determination and organization on the part of those who demanded and received such grants, and one which was necessitated by the power and complexity of the administrative machine under the control of those who granted them. It was a step which required considerable sophistication on the part of both, for it involved a fusion of the government's routine on the one hand with the privileges of the subject on the other. On the one side, routine procedures which the government had hitherto developed as administrative and political convenience dictated were now being conferred as rights to which the subject was entitled. On the other side, the privileges which the subject had hitherto enjoyed